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No. 79-1592

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK R. WEST,
Petitioner,

VERSUS

BOB BERGLAND, SECRETARY OF AGRICULTURE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Eighth Circuit

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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July, 1980

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Respondents' opposition to certiorari in this important case glides blithely over the very substantial questions of federal law presented here.

(1) The Secretary continually refers to what *he* has decided to do with regard to *his* assumption of power to impose severe sanctions on private citizens. But the "question of first impression" (*West* v. *Bergland*, 611 F.2d, at 716) here is whether *Congress* has authorized the Secretary to impose sweeping sanctions against private citizens under the Agricultural Marketing Act. *Civil Aeronautics Board* v. *Delta Airlines, Inc.*, 367 U.S. 316, 322 (1961) ("The de-

terminative question is *not* what the [Secretary] thinks [he] *should* do but what Congress has said [he] *can* do") (emphasis added).

The fact that the Secretary is unable to cite any persuasive statutory language, or legislative history, to support his claims of a sweeping, discretionary sanctioning power simply reemphasizes the need for plenary review of the issues here presented by this Court. *SEC* v. *Sloan*, 436 U.S. 103, 116-121 (1978). The Secretary, in reluctant recognition of the fact that the awesome power to deprive a citizen of his means of livelihood *for the rest of his life* as a "sanction" must have *some* basis in a grant of power from Congress, cites a smattering of uncodified appropriation statutes which simply authorized funding for the agriculture inspection service.[1] (Br.p.3, n.3).

This Court has recently held that federal administrators cannot defend "inherent" agency power on the basis of *appropriation* statutes. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 189-192 and n.35 (1978).

In each Act cited, Congress merely appropriated funds to the Secretary and directed him to "investigate and certify to shippers . . . the class, [etc. of certain named] farm products." *E.g.*, 50 Stat. 425 (1937). There is no hint in any of these statutes of *any* power to *refuse* to do what Congress commanded be done with the funds it appropriated. *See, TVA* v. *Hill, supra*, 437 U.S. at 189 and n.35.

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[1] No question involving the *inspection* service is presented here, as the Secretary himself emphasized in the two courts below.

Insofar as these appropriation Acts are probative at all, the sequence is:

(a) the Secretary did *not* have *any* power to withdraw either inspection *or* grading services prior to 1946;

(b) Senator Russell, the sponsor of the Bill which became the Agricultural Marketing Act of 1946, *emphatically* stated on the Senate floor that the Secretary was granted *no* regulatory power by the Act, and, based upon Senator Russell's *unequivocal* assurances, the Bill passed "without objection". 92 Cong.Rec. Part 8, 79th Cong., 2d Sess., p.10,370 *et seq.;*

(c) the Secretary's arrogation to himself of the "awesome power to suspend" services, *SEC* v. *Sloan, supra,* 436 U.S. 103, 112 (1978), in his sole discretion, is an act taken in defiance of the will of Congress, and must fall. *Brannon* v. *Stark,* 342 U.S. 451 (1952); *Zuber* v. *Allen,* 396 U.S. 168 (1969).

(2) Respondents' brief itself demonstrates the necessity for review in this case. The brief is riddled with internal self-contradictions caused, no doubt, by attempting to defend an impossible position. Respondents *concede* that the Secretary "cannot impose fines *or penalties*" under any provision of the Agricultural Marketing Act. (Br.p.9, emphasis added). But the unauthorized sanctioning power here claimed by respondents is surely a "penalty". As Judge Ross stated in his concurring opinion below:

> ". . . [t]he regulations should provide that a limit be placed upon the length of time that *the penalties will be enforced* . . .". 611 F.2d, at 725-726 (emphasis added).

7 C.F.R. § 53.13(a) expressly states that it is used *only* "for misconduct". A sanction imposed only for alleged *misconduct* is a "penalty". It has been so considered from the time of Blackstone (*see*, 1 Bl. Comm. *56) to the present day. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 165, 168-169 (1963).[2]

(3) Respondents assert (Br.p.7) that the Agricultural Marketing Act of 1946 is far more than "purely a research bill". To believe this is to believe that one of the most respected men ever to sit in the United States Senate, Senator Richard B. Russell, openly lied to his colleagues at length on the floor of the Senate. *See*, 92 Cong. Rec., Part 8, 79 Cong., 2nd Sess. at 10,370 *et seq.* (July 29, 1946). The notion is absurd. Equally absurd is the notion that such a pure research bill can give great and grave power to an administrator to impose severe sanctions upon a private citizen *in addition* to the criminal sanctions imposed by Congress. This Court has consistently rejected assertions of administrators claiming the power to create sanctions which may be imposed upon a private citizen *in addition to* those which Congress has enacted. *Campbell* v. *Galeno Chemical Company*, 281 U.S. 599, 609-610 (1930) (Brandeis, J.); *United States* v. *Weitzel*, 246 U.S. 533, 542 (1925). This Court has been required to remind the Secretary of Agriculture that such fundamental legislative power is granted only to Congress, not to him. *E.g.*, *Wallace* v. *Cutten*, 298 U.S. 229, 237 (1936) (Brandeis, J.). *See also*, *SEC* v. *Sloan*, *supra*, 436 U.S. 103, 115-121 (1978).

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[2] Indeed, *all* of the criteria identified by the Court in *Mendoza-Martinez* (372 U.S. at 168-169) as marking the indicia of a penal or quasi-penal sanction are clearly met by the very terms of 7 C.F.R. §53.13(a).

(4) Respondents argue a case which the facts simply do not present. Respondents suggest that agencies have "inherent power" to "refuse to deal with [various] persons. . . ." (Br.p.9).

Apart from the audaciousness of the assumption of "inherent power" to *sanction* a citizen, the underlying premise is hopelessly flawed and, of itself, shows the need for review here. Petitioner has *never* contended that respondents are legally required to "deal with" him. If, for example, the Secretary proposed to debar petitioner from participating in contractual awards of the Department of Agriculture, he could, consistent with procedures agreeable to due process, do so. In that situation, the cases cited by respondents, *Gonzalez,* v. *Freeman,* 334 F.2d 570, 576 (D.C. Cir. 1964) (Burger, J.) and *L. P. Stuart & Bros.* v. *Bowles,* 322 U.S. 398 (1943) might be relevant.[3]

But *that* is *not* this case.

In *this* case, petitioner seeks certiorari in order to resolve the question of whether a naked claim of "inherent power" by an administrator can be used to prevent a private citizen from doing business with another private citizen in a transaction to which the Secretary is *not* a

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[3] *L. P. Stuart & Bros.* was, however, a unique case involving a very broad grant of *wartime* rationing powers to the President himself. It was decided against the backdrop of the urgent national emergency generated by the Second World War. Mr. Justice Douglas was careful to confine the decision to its precise facts (322 U.S. at 403) and it has never been applied by this Court in *any* subsequent case. *See, Social Security Board* v. *Nierotko,* 327 U.S. 358, 369, n.23 (1946). Whether it is a viable precedent in a case such as this is dubious, but the mere fact the Secretary believes it is, shows the necessity for plenary review here.

party. Neither *L.P. Stuart & Bros., supra, Gonzalez* v. *Freeman, supra,* nor any other decision of *any* federal court supports such a sweeping claim of "inherent power" to *sanction* under these circumstances. *See, SEC* v. *Sloan, supra.* The question of whether such awesome power can be created by the incantation "inherent power", in the face of unequivocal statements of the sponsor of the Bill which became the statute under which the "inherent power" is claimed that it was "strictly a research bill", 92 Cong.Rec. Part 8, 79th Cong., 2d Sess. at 10,370 *et seq.* (July 29, 1946) (Sen. Russell) is "a question of first impression [which] is not easily rejected." (611 F.2d, at 715). The question should receive plenary review from this Court.

(5) Respondents observe that the sanctioning regulation has been in effect for a considerable time without a judicial challenge to its validity. That, of course, is wholly irrelevant to the question of whether the regulation is void. In *SEC* v. *Sloan, supra,* the SEC's suspension practice had been in use without challenge since 1944 (436 U.S., at 117), two years prior to the time the Agricultural Marketing Act was enacted. The long-continued administrative practice did not impress this Court, which unanimously held the SEC's suspension practice void. The same result should follow here.[4]

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[4] Respondents cite 1 Fed.Reg. 2126, 2129 (1936) as the first such regulation. No such regulation appears on the pages cited. 1 Fed. Reg. 2452-2455 (Dec. 10, 1936) is, presumably, what is intended. Yet the regulations there purport to be issued, in part, pursuant to an appropriation act for the Farm *Credit* Administration. Such grasping at straws for statutory authority merely emphasizes the infirmity of respondents' position.

(6) In our petition for certiorari, we demonstrated that, at the very least, this case must be remanded because the Secretary's appellate counsel sought to defend the regulation here at issue by virtue of a provision of the Agricultural Marketing Act of 1946, 7 U.S.C. § 1624(b), which is nowhere referenced in the administrative "complaint" filed against petitioner. *SEC* v. *Cherney Corporation*, 319 U.S. 80 (1943), and its progeny. Since we find respondents' argument on this point utterly incomprehensible, we do not lengthen this memorandum by responding to it. The simple fact is that the *post hoc* rationalization employed by the Secretary's appellate counsel, and accepted by the Court of Appeals, is so blatant a violation of the *Cherney* rule as not to need further discussion. Reversal and remand are, thus, the least that is required here.

(7) Respondents now suggest (Br.pp.1, 6, 7) that this case presents a question as to "exhaustion" of some supposed "administrative remedies" prior to judicial review. No such issue is presented. The Court of Appeals below unanimously held that petitioner need not exhaust any supposed "administrative remedies" because, assuming such a "remedy" existed, "exhaustion" would be a vain, useless, futile act with a foregone conclusion and without *"any* compensating clarification of the issue" since, *inter alia,* the only issue was one of law. *West* v. *Bergland*, 611 F.2d 710, 714-720 (8th Cir. 1979). Respondents filed no cross-petition for certiorari seeking review of the unfavorable holding. Since "these questions were decided adversely to respondents by the Court of Appeals and no cross-petition was filed here, . . . these questions are therefore not open to respondents at this stage." *Alaska Industrial*

Board v. *Chugach Electric Association*, 356 U.S. 320, 325 (1958); *accord, e.g., Strunk* v. *United States*, 412 U.S. 434, 437 (1973) ("in the absence of a cross-petition for certiorari, questioning the holding [with which the government disagrees], the only question properly before us is the [question presented by the petition for certiorari]"; *N.L.R.B.* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972) (while respondent disagrees with one aspect of the holding of the Court of Appeals, "since no timely cross-petition for certiorari was filed by the respondent, this question is not before us").[5]

In any event, for the reasons discussed at length by the Court of Appeals (611 F.2d, at 714-720) there is no merit in the suggestion that "exhaustion" is required in this case. The question for decision is whether the very regulation under which respondents seek to impose sanctions is unauthorized by the statute, and, thus, void. *Leedom* v. *Kyne*, 358 U.S. 184, 189 (1958); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 540 (1954); *Public Utilities Commission* v. *United Fuel Gas Company*, 317 U.S. 456, 469 (1943). Where, as here, only a pure question of law is presented, there must be a compelling reason to require "exhaustion". There is none here. *See, Ostereich* v. *Selective Service System*, 393 U.S. 233, 242 (1969) (Harlan, J., concurring); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 153-155 (1967); *Touche Ross & Co.* v. *SEC*, 609

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[5] Respondents state (Br.p.5 n.5) that the district court required petitioner to exhaust "administrative remedies". This is incorrect. The court of appeals clearly held that the district court had only required exhaustion of administrative remedies on the *remaining* questions, *i.e.*, the questions *other than* the question of whether 7 C.F.R. §53.13(a) was authorized by statute. *West* v. *Bergland*, 611 F.2d 710, 714 n.6.

F.2d 570, 572-577 (2d Cir. 1979). As the Court of Appeals below correctly stated, the question presented here is a pure question of law: "whether the regulation is authorized by the statute." *West* v. *Bergland*, 611 F.2d, at 715. This question is ripe for decision on the merits.[6]

The "exhaustion" argument, thus, is not properly before the Court and, in any event, is without merit.

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[6] Respondents' citation of such cases as *Myers* v. *Bethlehem Ship Building Corporation*, 303 U.S. 41 (1938), in which this Court held that a district court should not exercise its equitable powers to usurp the statutorily exclusive *fact-finding* function of the National Labor Relations Board, where the facts upon which resolution of the case depended were in vigorous dispute, is inexplicable. In this case, as the court below correctly stated, there is *no* factual issue in dispute which is "germane" to the questions presented by the instant petition for certiorari. (*West* v. *Bergland*, *supra*, 611 F.2d, at 715 n.7). Similarly, the citation to other "exclusive forum" cases such as *Yakus* v. *United States*, 321 U.S. 414 (1944), simply makes no sense in the present context. Congress has not here established a specialized trial court, or other fact-finding tribunal and expressly given that tribunal exclusive authority to determine all legal disputes which may arise under the agricultural laws of the United States. *Compare*, *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975). Absent such a statute, the "exhaustion" argument, when applied to pure questions of law such as are now before this Court, ceases to be a reasoned process and becomes a useless ritual to which a citizen is not to be needlessly subjected. *E.g.*, *McKart* v. *United States*, 395 U.S. 185 (1970); *Finnerty* v. *Cowen*, 508 F.2d 979, 982-83 (2d Cir. 1974).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this ___ day of July, 1980, mailed three true and correct copies of this Reply Memorandum to the Honorable Wade H. McCree, Jr., Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, and to further certify that all parties required to be served have been served, to-wit, Alice Daniel, Assistant Attorney General, Department of Justice, Washington, D.C. 20530.

BERNARD J. ROTHBAUM, JR.